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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

HOOPA VALLEY TRIBE,)	Civ. No. 1:20-cv-1814-JLT-EPG
)	
Plaintiff,)	
)	DECLARATION OF MICHAEL
v.)	ORCUTT IN SUPPORT OF
)	PLAINTIFF'S MOTION FOR
UNITED STATES BUREAU OF)	PRELIMINARY INJUNCTION
RECLAMATION; DEBRA ANNE HAALAND,)	
in her official capacity as Secretary of the)	Date: January 20, 2023
Interior; MARIA CAMILLE CALIMLIM)	Time: 9:00 am
TOUTON, in her official capacity as)	Courtroom: 4 – 7 th floor, Fresno
Commissioner of the United States Bureau of)	Hon. Jennifer L. Thurston
Reclamation; ERNEST A. CONANT, in his)	
official capacity as United States Bureau of)	
Reclamation California-Great Basin Regional)	
Director; and UNITED STATES)	
DEPARTMENT OF THE INTERIOR)	
)	
Defendants.)	

DECLARATION OF MICHAEL ORCUTT RE
PLAINTIFF'S MOTION FOR
PRELIMINARY INJUNCTION - 1

1 I, Michael Orcutt state and declare as follows:

2 1. I am a fisheries biologist and an enrolled member of the Hoopa Valley Tribe
3 (Tribe). I am presently employed by the Tribe, located on the Hoopa Valley Indian Reservation
4 in Northern California, where I continue my tenure of over 35 years as Director of the Fisheries
5 Department.

6 2. In my work with the Hoopa Valley Tribe Fisheries Department, and in my role as
7 Fisheries Director, I am intimately involved and have substantial personal knowledge of fisheries
8 management issues in the Trinity River Basin, including operations of the Trinity River
9 Restoration Program (TRRP) and Trinity Management Council (TMC), and implementation of
10 the 2000 Trinity River Record of Decision (ROD). My professional duties include representing
11 the Hoopa Valley Tribe before state and federal agencies and the U.S. Congress in matters
12 involving restoration of the Trinity River fishery. I also have fished and hunted on the Hoopa
13 Valley Reservation for most of my life and I have witnessed the devastation that the Trinity
14 River Division of the CVP has had on the fishery resources that the Hupa People have depended
15 upon since time immemorial.

16 3. The Hoopa Valley Tribe was a co-author of the 1999 Trinity River Flow
17 Evaluation Report (the "Flow Study"). The Flow Study recommended a total minimum annual
18 volume of water dependent on water year type but also provided detailed recommendations for
19 specific volumes of releases at specific times of year, along with a discussion of the purpose and
20 benefits of providing those specific volumes at specific times. The Flow Study designed Trinity
21 River Division (TRD) flow release schedules to restore, preserve and propagate natural fish
22 production by reestablishing habitat for the life history stages of anadromous salmonids that
23 inhabit the Trinity River.

24 4. The flow recommendations in the Flow Study were carefully developed by Hoopa
25 and its partner agency, the U.S. Fish and Wildlife Service, to achieve specific management
26 objectives and habitat restoration purposes on the mainstem Trinity River.

1 5. The Flow Study allocated all available annual flow amounts in the recommended
2 flow regimes to meet the intended management objectives.

3 6. In other words, the timing of the flow releases (the time of year in which the
4 releases occur) is of critical importance to the effectiveness of the flows and to meeting the goals
5 and management objectives discussed in the Flow Study.

6 7. The Flow Study recommendations were adopted in the Trinity River ROD, which
7 was approved by Secretary of the Interior Bruce Babbitt and which the Hoopa Valley Tribe
8 concurred in, through the signature of its Chairman Duane Sherman on December 19, 2000.

9 8. The ROD, pursuant to the recommendations in the Flow Study, sets a uniform
10 base flow of 300 cubic feet per second (cfs) across all water years for the time period of October
11 16 through April 1.

12 9. Since approval of the ROD, there has been no change to winter base flows
13 prescribed in ROD. Until now, the Bureau of Reclamation (BOR) has strictly adhered to the
14 October 16 through April 1 ROD flow schedule.

15 10. ROD TRD flow releases for each water year (October 1 to September 30
16 annually) are limited to a long term annual average water budget. That budget is further limited
17 by predicted annual hydrology. Annual hydrology estimates are based on California Department
18 of Water Resources Bulletin 120. The ROD has five annual hydrological categories: Extremely
19 Wet, Wet, Normal, Dry, and Critically Dry. The ROD assigns each water year type a volume of
20 TRD water. Pursuant to CVPIA Section 3406(b)(23) the ROD used the best available scientific
21 data to quantify and allocate the annual water budget throughout each water year type. The ROD
22 winter TRD base flow allocation is a direct outcome of compliance with the CVPIA's best
23 available scientific data requirement. The ROD winter base flow enables higher flows to meet
24 habitat requirements in Spring and Summer months, after the water-year type is determined.

1 11. The ROD does not provide for supplemental flow releases during the October 16
2 through April 1. Accordingly, increasing ROD base flows will decrease flows that the ROD
3 deems necessary for fishery restoration in other times of year.

4 12. The Trinity River Winter Flow Variability (WV) Project, which is authorized
5 for immediate implementation by the Department of the Interior, Bureau of Reclamation, would
6 shift substantial amounts of water (60,000 Acre Feet to 220,000 Acre Feet) for use in winter
7 months. Since the total annual water volumes are fixed, and since all water is allocated to
8 specific purposes, the re-allocation of water to winter months will deprive other months of water
9 and undermine the management objectives recommended in the Flow Study and approved in the
10 ROD with Hoopa's concurrence.

11 13. Since the initial proposal of the WV Project, I have personally repeatedly
12 advised officials of the Department of the Interior and Bureau of Reclamation, and members of
13 the Trinity Management Council (TMC), of Hoopa's objection and non-concurrence with the
14 WV Project. Moreover, the Hoopa Valley Tribal Council has written directly to Secretary
15 Haaland and other officials raising concerns about the WV Project's violation of Hoopa's rights
16 and interest under CVPIA Section 3406(b)(23).

17 14. Hoopa has informed the Secretary that the WV Project does not comply with the
18 restoration program requirements in the Trinity River ROD and has not undergone sufficient
19 scientific and technical review. There is a lack of data over a sufficiently diverse period of
20 record to reach conclusions on the progress of restoration. Reports are currently being prepared
21 by federal and tribal scientists and need to go through an interdisciplinary scientific process that
22 will synthesize accumulated information. The synthesis reports from that process will inform
23 any refinements that may be proposed to the restoration program. Any such refinements would
24 require the concurrence of the Hoopa Valley Tribe under CVPIA section 3406(b)(23) prior to
25 their implementation.
26

1 15. Based on Hoopa's knowledge and experience, Hoopa believes that that the WFV
2 Project will significantly undermine and impair the Trinity ROD's goals and objectives by
3 depriving the river of allocated water in Spring and Summer. Once water is released in winter
4 months under the WFV Project, it will be lost permanently. If fishery managers determine later
5 in the year that water previously released in winter is necessary to meet management objectives
6 in Spring or Summer, it will be too late. That water will have already been used.

7 16. At the December 7 meeting of the Trinity Management Council (TMC) (an
8 advisory body to the Secretary of the Interior), I again voiced Hoopa's opposition and non-
9 concurrence to the WFV Project. Despite this opposition and Hoopa's non-concurrence, the
10 TMC voted 7-1 in favor of implementing the WFV Project, commencing in this current water
11 year.

12 17. On December 9, 2022, I received a letter from the Chair of the TMC directed to
13 Defendant Ernest Conant, Reclamation California Great Basin Regional Director and Paul
14 Souza, US Fish and Wildlife Service Regional Director that included the TMC's recommended
15 2023 flow schedule incorporating the WFV Project. A true and correct copy of this letter is
16 attached as Exhibit 1.

17 18. The December 9 letter confirms that, commencing as early as December 15, 2022,
18 between 16 – 27% of the entire annual water volume under the ROD will be shifted from
19 summer releases to winter releases depending on water year type. This equates to a minimum
20 winter release of 60,000 acre-feet in a critically dry year to 220,000 acre-feet in an extremely wet
21 year. This is an extremely substantial, significant, and dangerous re-allocation and re-purposing
22 of water and it is in conflict with the Flow Study and the ROD. Significantly, the final water
23 year determination is not known until after the winter months. Thus, releases will be made in
24 winter without having full information about what releases will be necessary or allowable in
25 Spring and Summer months. Once the water year is known, however, the winter releases will
26

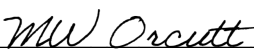
1 already have been made – and that water will no longer be available for its intended purposes in
2 Spring and Summer months.

3 19. Based on my decades of experience working for the Hoopa Valley Fisheries
4 Department, including as Fisheries Director, and my specific experience in working with
5 implementation of the Trinity River ROD and the Trinity River Restoration Program, it is my
6 belief that the Hoopa Valley Tribe, the Trinity River, and the long term health of the Trinity
7 River fishery will suffer irreparable harm if the WFV project is not enjoined. By sending water
8 releases down the river in winter months (between 16-27% of total annual ROD volumes), and
9 given the limited amount of water available pursuant to the ROD, implementation of the WFV
10 project will necessarily lower and limit the amount of water available to meet ROD objectives in
11 later months. Once the water is sent down the river in the winter, it will be lost forever and
12 unavailable for future use.

13 20. Implementation of the WFV Project by the Defendants in this case is authorized
14 to commence immediately. Thus, time is of the essence. An injunction is necessary as soon as
15 possible in order to stop the federal Defendants from releasing water down the river pursuant to
16 the WFV Project.

17 I declare under penalty of perjury under the laws of the United States of America that the
18 foregoing statements are true and correct.

19 DATED this 15 day of December, 2022.

20
21 _____

22 Michael Orcutt, Fisheries Director
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CERTIFICATE OF SERVICE

I hereby certify that on December 16, 2022, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such to the attorneys of record.

/s/ Thane D. Somerville
Thane D. Somerville